IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Victor Lu, et al.	Confirmation No. 6064
Serial No.: 10/053,541	Examiner: Ranodhi N. Serrao
Filed: November 2, 2001	Group Art Unit: 2141
For: SYSTEM AND METHOD FOR GENERATING AND REPORTING COOKIE VALUES AT A CLIENT NODE	
Date: May 23, 2006	

MAIL STOP Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANT'S BRIEF
UNDER 37 C.F.R. § 41.37

Appeal is taken from the Examiner's Office Action mailed December 27, 2005, finally rejecting claims 1-12 in the instant application.

This Appeal Brief is in furtherance of the Notice of Appeal mailed in this case on March 27, 2006.

The fees required under §41.37(a)(2) and any required petition for extension of time for filing this Brief and fees therefor are dealt with through the payment section of the electronic filing system.

This Brief contains these items under the following headings, and in the order set forth below.

TABLE OF CONTENTS

I. REAL PARTY IN INTEREST
37 CFR § 41.37(c)(1)(i)

The real party in interest in this appeal is WebTrends Inc., the assignee of the above-referenced patent application.

II. RELATED APPEALS AND INTERFERENCES
37 CFR § 41.37(c)(1)(ii)

There are no other appeals or interferences known to Appellant, the Appellant's representative, or assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS
37 CFR § 41.37(c)(1)(iii)

1.   Claims presented: 1-13

2.   Claims rejected: 1-12

3.   Claims allowed or confirmed: NONE

4.   Claims withdrawn: NONE

5.   Claims objected to: NONE

6.   Claims cancelled: 13

All the rejected claims, Claims 1-12, are being appealed. The appealed claims are eligible for appeal, having been finally rejected.

## IV. STATUS OF AMENDMENTS
37 CFR § 41.37(c)(1)(iv)

Subsequent to the last Office Action mailed on December 27, 2005, which contained a Final Rejection of the appealed claims, no further amendments have been filed.

V. SUMMARY OF CLAIMED SUBJECT MATTER
37 CFR § 41.37(c)(1)(v)

There are two independent claims, 1 and 9, involved in this appeal.

The claims in the instant application are directed to methods of tracking and reporting traffic activity on a web site through the use of cookies. Unlike prior art systems, where cookies and values are processed externally of the computer on which such cookies are stored, the invention as claimed operates cookie processing script at the visitor computer. That is, cookie processing script is included within the downloaded web page to a user's computer. Data mining code is also included and downloaded with the web page. The data mining code operates on the user's computer to obtain web browsing data (such as time spent on the web page). The cookie processing script is then operated at the user's computer and on the obtained web browsing data to obtain new cookie values. The new cookie values are then stored with the new cookie on the user's computer.

FIG. 5

Unlike prior art methods, the presently claimed methods of the invention operate to avoid certain cookie filters that operate on modern browsers such as Internet Explorer version 5.5 and above. As a result, users of the inventive method are able to more accurately track and gage visitations on their corporate or commercial web sites.
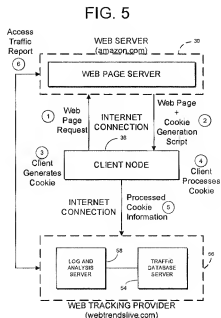
The independent claims are of various scope and claim overlapping features. Furthermore, each independent claim is directed to different aspects of the invention and each stand and fall, independently, with their associated dependent claims.

A. Independent Claim 1

Claim Language	Support in Specification/Figures
A method for tracking and reporting traffic activity on a web site comprising the steps of:	
storing a web page on a first server coupled to a wide area network, said web page having web page code and data mining code including a cookie processing script;	First server (element 12, FIG. 1) Wide area network (element 10, FIG. 1) Web page code and data mining code and cookie processing script (APPENDIX A)
uploading the web page to a visitor computer responsive to a request over the wide area network from the visitor computer;	"uploading" (step [2] in FIG. 5) Visitor computer (element 14, FIG. 1) also "client node" (element 36, FIGs. 2-5)
operating the data mining code on the visitor computer to obtain web browsing data; and	"operating . . . data mining code" (described in Spec. page 2, lines 22-31)
operating the cookie processing script at the visitor computer on the web browsing data to obtain new cookie values; and	"operating . . . cookie processing script" (steps [3] in FIG. 5)
storing the new cookie on the visitor computer including the new cookie values.	"storing" (also step [3] in FIG. 5; also Spec. page 14, lines 5-12)

B. Independent Claim 9

Claim Language	Support in Specification/Figures
A method for analyzing activity on a web page of a web site comprising the steps of:	
embedding data mining script within a web page;	Web page code and data mining code and cookie processing script (APPENDIX A)
embedding cookie processing script within the web page;	Web page code and data mining code and cookie processing script (APPENDIX A)
sending the web page to a client node;	"sending" (step [2] in FIG. 5) client node (element 36, FIG. 5)
operating the data mining script on the client node;	"operating . . . data mining code" (described in Spec. page 2, lines 22-31)

Claim Language	Support in Specification/Figures
operating the cookie processing script on the client node; and	"operating . . . cookie processing script" (steps [3] in FIG. 5)
returning data resulting from the operation steps.	"returning data" (step [5] in FIG. 5); see also Spec. page 14, lines 5-12.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL
37 CFR § 41.37(c)(1)(vi)

A.   Claims 1-3 and 5-12 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,112,240 (Pogue, et al.) and Appleman.

B.   Claim 4 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Pogue and Appleman, and further in view of U.S. Patent No. 6,374,359 (Shrader, et al.).

## VII. ARGUMENT
37 CFR § 41.37(c)(1)(vii)

The general issue is whether claims 1-12 under 35 U.S.C. § 103(a) are unpatentable in view of the prior art references. Briefly, the specific issues can be stated as follows:

A. The prior art of record fails to teach the step of embedding cookie processing script <u>in</u> the web page code.

    a. Pogue's teaching of an embedded "tracker tab" Java applet does not qualify as cookie processing script;

    b. Appleman's cookie processing script is located at the web server, not on the downloadable web page;

B. The prior art of record fails to teach the step of operating the cookie processing script <u>at the visitor computer</u> and on the web browsing data.

    a. Pogue's cookie processing script operates on an external computer (e.g. tracker 310), not the visitor computer.

    b. Appleman's cookie processing script operates on the web server, not the visitor computer.

These issues will be divided into respective subsections and will address each of the grounds for rejection separately by prior art (e.g. Pogue, and Appleman).

A. The Pogue Reference Does Not Teach Critical Features Of The Claims

The current rejections hinge on the finding by the Examiner that the Pogue reference teaches the steps for (a) embedding cookie processing script in the web page code and (b) operating the cookie processing script on the web browsing data to obtain new cookie values. The Examiner cites the material in Pogue FIG. 6, and the text starting at Col. 6, line 46 through Col. 7, line 22 for support of this interpretation. Appellants traverse this reasoning on the grounds that <u>Pogue does not teach the concept of embedding cookie processing scripts within the transmitted web page and operating the cookie processing script on the client computer.</u> Instead, Pogue appears to teach that all cookies are generated in a tracker 310 external to the client computer 200.
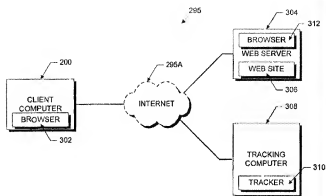
Pogue (Figure 3 to the left) clearly identifies the physical difference between a client computer 200 (which host the browser 302) and the tracking computer 308 (which hosts the tracker 310) connected through the Internet cloud 295A.

Then Pogue (Col. 6, line 51 to Col. 7, line 10) describes Step 602 where "the browser 302 then reads and executes the tracker tag, which causes a tracker message to be directed from the browser 302 to the tracker 310 <u>on the tracking computer 308</u>." (emphasis added)

Clearly at this stage, there is a physical difference between the client computer 200 and the tracking computer 308. But to further the point, Pogue clearly admits that cookie processing is accomplished on the tracking computer 308 by the comment (Col. 7, lines 11-15) that "the tracker 310 then transmits a new cookie to the browser 302...."

In addition, Pogue (Col. 7, lines 48-50) further identifies that a tracker 310 is "any program that implements the above described processes. In the preferred embodiment, the tracker 310 is a <u>CGI program</u> written in C++." This statement, for someone skilled in the arts, clearly limits the applicability of program execution for the tracker 310 program, as web browser 302 does not support the concept of a CGI gateway.

More specifically, Pogue states only generally that "the tracker 310 uses cookies and common gateway (CGI) scripts to obtain the client information." The tracker 310, however, operates on the tracking computer 308 and not on the browser of the client computer 200, see, e.g., Pogue FIG. 3. Furthermore, FIG. 6 shows that the tracker directs the cookie to the browser; a step that would be unnecessary in the present invention where the cookie is generated at the client computer itself by the cookie generating script residing there. Responsive to a browser command at the client computer, the Pogue tracker (external of the client computer) receives the last cookie [Col. 7, line 3] and then transmits a new cookie to the browser [Col. 7, lines 11-13] thereby replacing the old cookie.

In summary, therefore, Pogue does not in fact teach the steps of including cookie processing script within the web page and uploading the web page (and the script) to the visitor computer to operate thereon. Instead, Pogue appears to teach common usage of cookies that are stored on the visitor computer, accessed during a web page download request, and changed at the web page server or associated external computer to indicate the request. Such a feature would be blocked by the browser feature noted in the Background of the Invention section, see, e.g., page 3, lines 7-15 of the filed application. To further emphasize this difference between Pogue and the present invention as claimed, we have amended the fifth step of claim 1 to recite that the cookie processing script is operated at the visitor computer on the web browsing data to obtain new cookie values. Claim 9 needs no such clarification as the wording explicitly states that the cookie processing script is operated at the client node. Neither of the other prior art references, Appleman (see section B below) and Shrader, provide the missing elements from the claims and therefore rejection under §103(a) would be improper. Furthermore, as the claims dependent from independent claims 1 and 9 necessarily include such a feature, missing from the prior art, such dependent claims would be likewise allowable over the prior art of record.

Despite the clear indication within Pogue that the cookie processing script is operated externally to the visitor computer or client node, the Examiner has addressed the above distinguishing remarks as follows:

> The applicant argued in substance that Pogue does not teach the concept of embedding cookie processing scripts within the transmitted web page and operating the cookie processing script on the client computer. The examiner points to Col. 7, lines 11-47, wherein Pogue describes sending a cookie to the browser 302 then a few steps later, "This causes the browser 302 to execute the applet on the client computer 200, thereby gathering the client information." The tracker tag is written in Javascript and runs on the client computer, See, Col. 4, line 61- Col. 5, line 4.
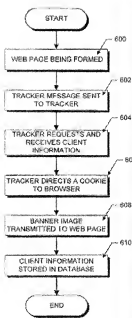
FIG. 6

The Examiner appears to be confusing two distinct implementations of the web site information tracker noted in the Pogue reference. In one, shown in FIG. 6 (to the left), a tracker operates remotely from the visitor computer and transmits new cookies to the visitor computer to replace old ones. The new cookie is generated at the tracker 310 responsive to information received from the visitor computer together with the old cookie. The alternate embodiment of the tracking system is shown in FIG. 7 (to the right) and comprises a "tracker tab" Java applet that gathers client
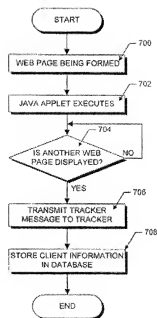

FIG. 7

information and transmits this information back to the remote tracker 310 via a tracker message. Combination of these two distinct embodiments is impermissible and there is no indication that such would work. (See, e.g., Section C below) Even if FIG. 6 and FIG. 7 could be combined, there is no indication in the FIG. 7 tracker tag Java applet that acts as a "cookie processing script." In other words, the Java applet in Pogue does not create "new cookie values" as specified in the claims, and "store the new cookie [including the new cookie values] at the visitor computer.

It appears from the quote above that the Examiner has made the "tracker tag" of the Pogue embodiment of FIG. 7 an equivalent to the "cookie processing script" in the present invention. Case law is fairly specific on how claim language is to be interpreted during prosecution. "Words in a claim are generally given their ordinary and accustomed meaning unless the inventor chooses to be his own lexicographer in the specification." *Lantech, Inc. v. Keip Mach. Co.*, 32 F.3d 542, 547, 31 USPQ2d 1666, 1670 (Fed. Cir. 1994). "In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification." *In re Yamamoto*, 740 F.2d 1569, 1571, 222 USPQ 934, 936 (Fed. Cir. 1984). The Federal Circuit cautions, however, that the PTO is not to erroneously construe the claims (as was the case in *Baker Hughes*) where such

construction was "beyond that which was reasonable in light of the totality of the written description." *In re Baker Hughes, Inc.*, 215 F.3d 1297, 55 USPQ2d 1149 (Fed. Cir. 2000).

The fact that the tracker tag is written in the same computer language (Javascript) as a preferred embodiment of the cookie processing script is not definitive. The pending patent application on appeal in fact includes two elements downloaded with the web page to and operable on the visitor computer: data mining script, and cookie processing script. The Pogue tracker tag is one element, not two. Additionally, and more importantly, the Pogue tracker tag does not perform critical functions that characterize the very definition of cookie processing script: a cookie processing function that results in a modified cookie being stored. Appellants suggest, therefore, that the Examiner is associating an unreasonably broad meaning to the "cookie processing script" limitation in the pending claims in violation of case law under *Baker Hughes* and related cases. Appellants thus respectfully submit that the claims as written be allowable over the Pogue reference and combinations therewith.

B. *The Appleman Reference Does Not Teach Visitor-Hosted Cookie Processing Script*

It appears that the Examiner has implicitly agreed that Appleman does not teach visitor-hosted cookie processing script by reason of his removal of the §102(e) rejection of the claims after Appellants' response to the First Office Action. Appellants wish to present such remarks for consideration of the Board.

Appellants have conducted a careful review of the Appleman reference and cannot find a teaching therein of embedding of cookie processing script within a web page. This finding is summarized as follows: (1) Appleman was filed prior to the backlash against storing and retrieving third party cookies and prior to such browsers as IE5.5 blocking such cookies; (2) embedding such script (as opposed to setting the cookie values at the server providing the web page) would thus serve only to increase the size of the file being served and since Appleman was filed before; and (3) Appleman is only concerned with guide site visits for the purpose of tracking necessary compensation to those sites, a feature very different from the thrust of the present invention.

More specifically, Appellants conclude that the Appleman patent does not teach that cookie processing script would be embedded within a web page. In fact, the only use of cookies mentioned in the Appleman patent pertains to tracking of the "point of entry" of a web link found on a third party web service to the collaborative system.

Per the Appleman patent, FIG. 6A, teaches that the processing is performed when a third party web service provides a URL link into the collaborative system, as step 524 (Col. 16, line 39-53) describes setting of a cookie by script. The Appleman reference, when referring to "a script file or executable program may be located at the predetermined URL," specifically states that the script is located on a web server (at the predetermined URL). Thus, the logical conclusion is that a cookie is sent to a user's browser by a script residing and executing on a web server (residing at the predetermined URL) rather than being transmitted with and then active on the web page visitor's computer as with the present invention.

FIG. 8

Furthermore, the Appleman cookie is used simply to identify the "point-of-entry." This cookie information is then passed back to the web server for use in generating a "standard" collaborative web page. Again, the executing script/executable resides on a web server and not an embedded web page. Per FIG. 8 (to the left), and Col. 16, lines 54-67, Appleman states that "the collaborative guide system may then generate a 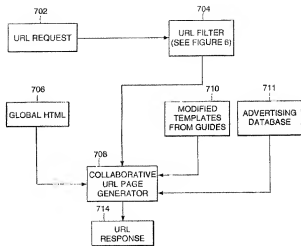response to the request for the web page." This again implies, by the use of the term request and response, a web server side execution of scripts rather than visitor computer side script execution.

The Examiner's reading of Appleman onto the limitations of pending claims 1 and 6 appears to mix features from three independent systems described in the Appleman patent. That is, the three systems (Col. 3, line 9-17) are in many respects completely independent and not subject to arbitrary combination. The Examiner mixes elements from all the described systems into an overall process which, in Appellants' opinion, does not reflect the intent and purpose of the Appleman patent. Appellants' reading of the pertinent points of the Appleman patent in question is as follows:

(1) Per FIG. 9, Appleman presents a method for a content provider ("guides") to upload their web page content into this collaborative guide system. This system (server side, the CHEWY Tool process) then generates a "standard" collaborative web page that can then be made available for publishing by each individual guides. In addition, each web page content can also be "data mined" and/or indexed into a virtual taxonomy.

(2) Appleman provides a method for a third party web service (including search engines) to include a predetermined URL that can be use to navigate into a "standard" collaborative web page as described in (1) above. This predetermined URL can set a cookie (which by its language, describes a server side execution) that identifies the "point-of-entry" for later use. This information is then used to dynamically generate redirection commands for a user's browser.

In summary, therefore, Appellants would not read the Appleman patent to in any way teach the concept of embedding scripts delivered for execution by a user's web browser. And, furthermore, the Appleman patent does not teach the concept of setting cookies by scripts executing on a user's web browser. Accordingly, critical elements of the claims are not taught or suggested in the prior art that would support a §102 or §103 grounds for rejection.

C. *There is No Suggestion to Combine Features of the Pogue and Appleman References*

All pending claims have been rejected under §103(a) as being an obvious combination of several references (Pogue, Appleman, and Shrader).

The Federal Circuit has been consistent in reversing the PTO when a rejection is made on the basis of hindsight, that is when an Examiner rejects the application under 35 U.S.C. §103(a) grounds as obvious under a combination of two or more patents without any specific suggestion within the patents to combine the features. In re Rouffet, 47 USPQ2d 1453 (Fed. Cir. 1998), the Federal Circuit refused to uphold an obviousness rejection, even where skill in the art is high, absent the specific identification of principal, known to one of ordinary skill in the art that suggests the claimed combination.

The Federal Circuit reemphasized the care to be taken when combining prior art references in obviousness findings in Ecolochem v. Southern Cal. Edison, 56 USPQ2d 1065 (Fed. Cir. 2000), stating that such absence of evidence to combine prior art references "is defective as hindsight analysis." The Federal Circuit held similarly in In re Kotzab, 55 USPQ2d 1313 (Fed. Cir. 2000), reversing the PTO and stating that, "[i]dentification of prior art statements that, in abstract, appear to suggest claimed limitation does not establish prima facie case of

obviousness without finding as to specific understanding or principal within knowledge of skilled artisan that would have motivated one with no knowledge of the invention to make the combination in the manner claimed."

Finally, the Federal Circuit has reaffirmed their view that the PTO used improper hindsight analysis to reject patent claims under §103(a) in the recent case of In re Lee, 277 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002), stating that a specific suggestion in the prior art cited is required and not a simple citation to "common knowledge and common sense." Lee includes a tour-de-force of case law directed to the issue of combining references including those as follows:

- "The factual inquiry whether to combine references must be thorough and searching. . . . It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with." (Lee, 277 F.3d at 1343)

- "A showing of a suggestion, teaching, or motivation to combine the prior art references is an essential component of an obviousness holding." (*quoting* Brown & Williamson Tobacco Corp. v. Philip Morris, Inc., 229 F.3d 1120, 1124-25, 56 USPQ2d 1456, 1459 (Fed. Cir. 2000)

- "Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references." (*quoting* C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1352, 48 USPQ2d 1225, 1232 (Fed. Cir. 1998)

- "There must be some motivation, suggestion, or teaching of the desirability of making the specific combination that was made by the applicant." (*quoting* In re Dance, 160 F.3d 1339, 1343, 48 USPQ2d 1635, 1637 (Fed. Cir. 1998).

- "Teachings of references can be combined *only* if there is some suggestion or incentive to do so." (*quoting* In re Fine, 837 F.2d 1071, 1075, 5 USPQ2d 1596, 1600 (Fed. Cir. 1988) (emphasis in original)

The sections above remark on the prior art's failure to teach all elements of the claims. Additionally, the Patent Office has additionally failed to display the rigor required by the Federal Circuit holdings in demonstrating a suggestion within the art that the cited prior art references

should be combined. Each of the patents recite multiple and independent methods for executing data analyses. No motivation has been presented for picking and choosing elements from various independent embodiments across multiple patents without the inference of hindsight.

VIII. CLAIMS APPENDIX
37 CFR § 41.37(c)(1)(viii)

A copy of the claims involved in the appeal, Claims 1-12, are attached hereto as an appendix, entitled Claims Appendix.

IX. EVIDENCE APPENDIX
37 CFR § 41.37(c)(1)(ix)

No evidence was submitted pursuant to 37 CFR §§ 1.130, 1.131 or 1.132 of this title, nor was any other evidence entered by the Examiner and relied upon by the Appellant in the appeal.

X. RELATED PROCEEDINGS APPENDIX
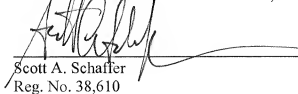### 37 CFR § 41.37(c)(1)(x)

No related proceeding was identified pursuant to 37 CFR § 41.37(c)(1)(ii) of this section.

CONCLUSION

For the foregoing reasons, Appellant requests that the Board reverse the Examiner's rejections to Appellant's claims.

Respectfully submitted,

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VIII. CLAIMS APPENDIX
37 CFR § 41.37(c)(1)(viii)

The text of the claims on appeal, 1-13, are as follows:

1.   A method for tracking and reporting traffic activity on a web site comprising the steps of:

storing a web page on a first server coupled to a wide area network, said web page having web page code and data mining code including a cookie processing script;

uploading the web page to a visitor computer responsive to a request over the wide area network from the visitor computer;

operating the data mining code on the visitor computer to obtain web browsing data; and

operating the cookie processing script at the visitor computer on the web browsing data to obtain new cookie values; and

storing the new cookie on the visitor computer including the new cookie values.

2.   The method of claim 1, further comprising the step of receiving the new cookie values at a second server.

3.   The method of claim 2, further including the steps of:

attaching the new cookie values to an image request associated with a designated URL source; and

sending the image request to the URL source.

4.   The method of claim 3, further including the step of decoding the new cookie values to obtain the web browsing data.

5.   The method of claim 3, further including the steps of:

compiling the web browsing data into a web page traffic report; and

posting the report for viewing over the wide area network.

6. The method of claim 1, wherein the step of generating a new cookie includes the step of operating the cookie processing script on an old cookie associated with the web page and previously stored on the visitor computer.

7. The method of claim 6, further including the step of overwriting the old cookie with the new cookie.

8. The method of claim 1, further including the steps of:
detecting that an old cookie exists on the visitor computer associated with the web site;
tracking events on the visitor computer;
processing the old cookie using cookie processing code in view of the tracked events to obtain new cookie values; and
replacing the old cookie values with the new cookie values.

9. A method for analyzing activity on a web page of a web site comprising the steps of:
embedding data mining script within a web page;
embedding cookie processing script within the web page;
sending the web page to a client node;
operating the data mining script on the client node;
operating the cookie processing script on the client node; and
returning data resulting from the operation steps.

10. The method of claim 9, wherein the step of operating the cookie processing script on the client node includes:
reading a cookie value from the client node;
tracking events on the client node;
processing cookie value based on the tracked events to obtain a new cookie value; and
writing a new cookie value to the client node.

11. The method of claim 9, wherein the step of returning data includes the steps of:

embedding data within an image request associated with a designated URL source; and sending the image request to the URL source.

12. The method of claim 11, further including the steps of:

compiling the data into a web page traffic report; and

posting the report for viewing over the wide area network.